No. [redacted] 97

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1943

FLETCHER TRUST COMPANY, TRUSTEES AND TRANSFEREES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF SAID PETITION.

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PETITION.

Fletcher Trust Company, Trustees and Transferees, prays that a writ of certiorari issue to review the judgment (R. 103) of the Circuit Court of Appeals for the Seventh Circuit, entered in the above entitled cause on

February 17, 1944, affirming a decision (R. 76) of the Tax Court of the United States.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 95-102) is reported in 141 F. 2d 36 (Advanced Sheets). The opinion of the Tax Court (R. 71-75) is reported in 1 T. C. 798.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 17, 1944 (R. 103). On March 3, 1944, a timely petition for rehearing was filed in that court by petitioner (R. 104) and on March 23, 1944, was denied (R. 106). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925 (43 Stat. 938).

Statement.

This cause relates to federal gift tax liability for the year 1936 determined by respondent for assessment against petitioner as trustee and transferee of property from Hugh McK. Landon, donor. The gift tax liability of Landon relates to the execution by him on July 18, 1936, of a certain written Third Amendment to a trust indenture executed by Landon and petitioner on May 23, 1932, by which amendment Landon cancelled and surrendered the power reserved to him by paragraph 10 of the original trust indenture, to change the trust beneficiaries without making himself a beneficiary.

A timely gift tax return reporting the entire transaction was filed by Landon, but respondent permitted the three

year period of limitation for assessment of tax against the donor to expire without having taken any steps to assess tax to the donor, and respondent then proceeded against petitioner, as trustee and transferee of the trust property. Respondent determined that the execution of such Third Amendment constituted a taxable gift of the value on July 18, 1936, of the property then constituting the trust *res*, and gave notice of such determination to petitioner. On appeal to the Tax Court respondent's determination was upheld by a divided court. Smith and Mellott, JJ., dissented from the Tax Court's opinion but wrote no dissenting opinion. Disney, J., concurred only in the result reached by the opinion.

Virtually all of the facts were stipulated (R. 23-62) before the Tax Court. In addition to the stipulated facts certain other facts were duly proved by the testimony of witnesses.

Landon is a resident of Marion County, Indiana, and is a citizen of the State of Indiana and of the United States of America and has been such resident and citizen continuously since prior to May 23, 1932 (R. 23).

Fletcher Trust Company is an Indiana corporation and is engaged in a general banking and trust business in the City of Indianapolis (R. 23).

On May 23, 1932, Landon, as donor, and Fletcher Trust Company, as trustee, entered into a written trust agreement (R. 24 and R. 33-37). The trust thereby created related to four policies of insurance upon the life of Landon which were concurrently assigned and delivered to petitioner, as trustee (R. 24). The trust agreement required petitioner to hold the policies until their maturity and upon

the donor's death to divide the policy proceeds into three separate trust funds for the benefit of the donor's three daughters, each of whom was given the life income from her respective trust fund. Gifts of the remainder interests were also provided. The trust agreement contained no provision making Landon a beneficiary or giving him control of the trust property, or permitting him or any other person to alter, amend or modify the terms thereof or to rescind the agreement or to revoke or terminate the trusts thereby created, except that by paragraph 10 thereof Landon reserved the right to change any of the beneficiaries of the trust or the terms upon which any beneficiary should receive his share, with the express provision that Landon should not himself become a beneficiary. Paragraph 10 reads:

> "10. This trust shall be irrevocable, but Donor, during the period ending thirty days prior to Donor's death, reserves the right to change any of the beneficiaries hereunder or the terms upon which any beneficiary shall receive his share, except that Donor shall not himself become a beneficiary." (R. 36.)

On September 7, 1935, Landon executed (R. 24) a written "First Amendment" (R. 37-38), amending the original trust agreement of May 23, 1932, and on September 18, 1935, Landon executed (R. 24) a written "Second Amendment" (R. 38-39), further amending the original trust agreement of May 23, 1932. Neither the First Amendment nor the Second Amendment is material to the issues in the case.

On July 18, 1936, Landon executed (R. 25) a written "Third Amendment" (R. 40), further amending the original trust agreement of May 23, 1932, by cancelling and surrendering the power reserved to him by paragraph 10 of the

original trust indenture to change the beneficiaries of the trust without making himself a beneficiary.

On March 15, 1937, Landon filed (R. 25) with the Collector of Internal Revenue at Indianapolis a federal gift tax return (R. 27-41) for the calendar year 1936, in which he fully reported the execution of the Third Amendment of July 18, 1936, and claimed that under the gift tax law and Treasury regulations no taxable gift had been made by the surrender of his reserved power.

On June 4, 1937, petitioner filed (R. 25) with the Collector a "Donee's or Trustee's Information Return of Gifts", Treasury Department Form 710 (R. 41-46).

In June, 1936, Landon caused to be filed (R. 25) with the Collector four Life Insurance Statements, on Treasury Department Form 938 (R. 47-57), setting forth the correct interpolated gift tax values on July 18, 1936, of the four policies of insurance transferred to petitioner at the time of the execution of the original trust agreement. With the filing of such Life Insurance Statements, respondent was given all data and information needed to make final determination of the gift tax deficiency which was later determined by respondent against petitioner and was upheld by the Tax Court and the Circuit Court of Appeals.

On January 18, 1941, respondent mailed to petitioner (R. 26) a notice of a deficiency of gift tax (R. 58-62) determined to be owing by Landon for the year 1936 by reason of the execution of said Third Amendment of July 18, 1936, but to be assessed against petitioner as Trustee and Transferee.

Prior to executing the Third Amendment of July 18, 1936, Landon was advised by counsel that the then existing

Regulations of the Treasury Department relating to the federal gift tax recognized that the cancellation and surrender of the power reserved to him to change beneficiaries without making himself a beneficiary, did not constitute a taxable gift, and acting in reliance on such Regulations Landon executed the Third Amendment (R. 64-67).

During all of the period from March 15, 1937, the date of the filing of Landon's federal gift tax return for 1936, to March 16, 1940, Landon was solvent; he was not rendered insolvent by the execution on July 18, 1936, of the Third Amendment; and he was at all times during that period fully able to pay any amount of federal gift tax liability which might properly have been determined against him in respect to any taxable gift resulting from the execution of the Third Amendment. Neither the original creation of the trust nor the surrender of the reserved power effected by the execution of the Third Amendment was made with the intent on the part of Landon to hinder, delay or defraud his creditors, and neither the creation of the trust nor the surrender of the power was in any other way or for any other reason fraudulent as to his creditors. Petitioner did not assume or agree to pay any liability of any kind whatsoever of Landon, either at the time of the creation of the trust, or at the time of the execution of the Third Amendment, or at any other time (R. 63-64).

Questions Presented.

By their respective opinions both the Circuit Court of Appeals and the Tax Court held that by the execution of the Third Amendment, surrendering his reserved power, Landon, as donor, made a taxable gift; that the beneficiaries of the trust are "donees" and incurred personal liability

for the donor's tax under Section 510 of the Revenue Act of 1932; that such donees are included within the definition of "transferees" contained in Section 526(f) of the Revenue Act of 1932 and are therefore subject to summary procedure provided for the collection of the liability of transferees by Section 526(a)(1) of the Revenue Act of 1932 and to the one-year extended period of limitation on the collection of such transferee liability under Section 526(b)(1) of the Revenue Act of 1932; and that petitioner, as trustee, is liable, to the extent of the trust property, as "fiduciary of transferee", under Section 527(b) of the Revenue Act of 1932, for the transferee liability of the donee-beneficiaries.

The questions presented are:

1. Whether Section 501 of the Revenue Act of 1932 as interpreted by Article 3 of Regulations 79, 1936 edition, adopted February 26, 1936, and in effect on July 18, 1936, imposed gift tax liability on Landon in respect to the execution of the Third Amendment of July 18, 1936, and, if as so interpreted it did not impose such gift tax liability, whether such Article 3 of Regulations 79 is a valid and binding interpretation by which the liability of Landon for gift tax in respect to said Third Amendment is to be determined.

2. Whether the beneficiaries, who are only contingent beneficiaries in expectancy of a spendthrift trust, incurred personal liability as donees for the donor's gift tax under Section 510 of the Revenue Act of 1932.

3. Whether the failure of respondent to send a deficiency notice to the donor, Hugh McK. Landon, as required by Section 513(a)(1) of the Revenue Act of 1932 prevented

respondent from asserting liability against petitioner as trustee or transferee or as fiduciary of a transferee under Section 526 of the Revenue Act of 1932.

4. Whether the collection of the liability of the donee-beneficiaries for gift tax under Section 510 of the Revenue Act of 1932 is barred by the three-year statute of limitations provided by Sec. 517(a) of the Revenue Act of 1932.

5. Whether the statutory liability of a donee for the "tax imposed by this title" under Section 510 is included within the "liability, at law or in equity, of a transferee" enforceable under Section 526 of the Revenue Act of 1932.

6. Whether the requisite notice to the Commissioner referred to in Section 527(b) of the Revenue Act of 1932 was given in this case, thereby bringing into operation the provisions of that section of the Act and subjecting petitioner as fiduciary of transferee to the duties placed on a transferee by Section 526 of the Revenue Act of 1932.

7. Whether petitioner is a fiduciary of a transferee under Section 527(b) of the Revenue Act of 1932 and as such fiduciary is subject to the transferee provisions of Section 526 of the Revenue Act of 1932, including a duty to discharge the liability of Landon for gift tax in respect to the execution of the Third Amendment of July 18, 1936.

Statutes and Regulations Involved.

The pertinent statutes and regulations are reproduced in the Appendix to this petition.

Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that Landon's surrender of the reserved power to change beneficiaries of the trust without making

himself a beneficiary constituted a taxable gift under Section 501 of the Revenue Act of 1932, as interpreted by Article 3, Regulations 79 (1936 ed.).

2. In holding that the beneficiaries of the instant trust are donees and as such incurred statutory personal liability for the donor's gift tax under Section 510 of the Revenue Act of 1932.

3. In holding that respondent could proceed against petitioner as fiduciary of a transferee without having sent a deficiency notice to the donor, Landon, as required by Section 513(a)(1) of the Revenue Act of 1932.

4. In holding that the collection of gift tax liability is not barred by the three-year statute of limitations contained in Section 517(a) of the Revenue Act of 1932.

5. In holding that the "liability at law" of a transferee enforceable under Section 526(a) of the Revenue Act of 1932 includes the statutory personal liability placed by Section 510 of that Act on a donee for the "tax imposed by this title".

6. In holding that petitioner is a fiduciary of a transferee under Section 527(b) of the Revenue Act of 1932 and is subject to the duties and liability placed on a transferee by Section 526 of the Revenue Act of 1932.

7. In holding that notice as required by Section 527(b) and (c) and Article 61, Regulations 79 (1936 ed.), was given to respondent, thereby bringing into operation Section 527 (b) and subjecting petitioner to the transferee provisions of Section 526 of the Revenue Act of 1932.

8. In affirming the decision of the Tax Court.

9. In denying Petitioner's Petition for Rehearing.

Reasons for Granting the Writ.

1. The decision of the Court below holds invalid Article 3 of Regulations 79 (1936 ed.) as applied prospectively, a question on which this Court withheld its decision in *Rasquin v. Humphreys*, 308 U. S. 54. Its holding is not only in conflict with the administrative interpretation but also with Congressional approval given to such interpretation. On this question depends the existence of liability for federal gift tax in respect to all transactions of the kind here presented from February 26, 1936, the effective date of Article 3 of Regulations 79 (1936 ed.), to January 1, 1939, the effective date of Section 502 of the Revenue Act of 1943. This is an important federal question which has not been, but should be, clearly settled by this Court.

2. The Court below held that a contingent beneficiary in expectancy of a spendthrift gift in trust is a donee and is personally liable for the donor's gift tax under Section 510 of the Revenue Act of 1932. To impose such personal liability on an unwitting person who is only a contingent beneficiary in expectancy of a spendthrift trust from which he has at present received nothing and may never receive anything is not within the true intent of the law and is in contravention of due process of law. This is a most important question of federal law which has not been, but should be, settled by this Court.

3. The Court below failed to apply the absolute requirement made by Section 513(a) of the Revenue Act of 1932 of notice to the donor of any determination of deficiency in gift tax and the prohibition therein contained against collection or assessment of such deficiency without the sending of the required notice to the donor. The donor is

constitutionally entitled to notice of any determination of his federal gift tax liability and to be heard in respect thereto. Section 513(a) guarantees that constitutional right, but the Court below has refused to follow the clear mandate of the law. This is an important federal question which has not been, but should be, settled by this Court.

4. Section 510 of the Revenue Act of 1932 makes a donee liable for "the tax imposed by this title", and Section 517(a) requires the "tax imposed by this title" to be assessed within three years after the filing of the donor's return. The Court below has failed to apply the explicit requirement of Section 517(a) that the "tax imposed by this title" be assessed within the three-year period. The effect of the decision of the Court below is to nullify the obvious legislative intent that the Commissioner shall assess the "tax imposed by this title" within the three-year period, and in all cases to enlarge such assessment period to four years. This is an important federal question which has not been, but should be, decided by this Court.

5. By its decision the Court below has held that the liability of a donee under Section 510 of the Revenue Act of 1932 is included in "liability at law or in equity" of a transferee dealt with by Section 526 of that Act, whereas Section 526 and all other provisions of the Act carefully distinguish between statutory liability for the "tax imposed by this title" and "liability at law or in equity". Properly construed, the Act excludes statutory liability for the "tax imposed by this title" from the "liability at law or in equity" enforceable against a transferee, and therefore does not provide an additional year for assessing statutory liability for the "tax imposed by this title" which Congress

expressly required to be assessed within the three-year period fixed by Section 517(a) of the Act. This is an important federal question which has not been, but should be, settled by this Court.

6. The Court below has held that a trustee presently acting only as a custodian for safekeeping of certain insurance policies, possessing only limited powers commensurate with its status as custodian and having no property from which to pay an asserted gift tax liability, is a trustee of a transferee within the purview of Section 527(b) of the Revenue Act of 1932 and must assume all of the powers, rights, duties and privileges of a transferee, an onerous and arbitrarily imposed burden which such trustee is not qualified or equipped to assume. This is a misinterpretation of the true intent of the law and presents a serious problem to all fiduciaries of gifts in trust. It is an important federal question which has not been, but should be, decided by this Court.

7. The Court below failed to give effect to the express condition and requirement made by Section 527(b) of the Revenue Act of 1932 of notice to the Commissioner and to the requirement made by Section 527(c) that such notice shall be given in accord with regulations prescribed by the Commissioner, and failed to give effect to Article 61 of Regulations 79 (1936 ed.) specifying the exact character and contents of the notice required to bring Section 527(b) into operation. The effect of the decision of the Court below is to permit any kind of notice or information received by the Commissioner of the existence of a fiduciary relationship to be the basis for imposing all of the powers, rights, duties and privileges of a transferee on an unsuspecting trustee neither prepared nor equipped to assume

such burden. This is an important federal question which has not been, but should be, settled by this Court.

Respectfully submitted,

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By JOSEPH J. DANIELS,

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BRIEF IN SUPPORT OF PETITION

ARGUMENT

1.

Section 501[1] Should Be Construed in Accord with Article 3, Regulations 79 (1936 ed.) Not To Tax the Donor's Surrender of His Reserved Power.

In *Rasquin v. Humphreys*, 308 U. S. 54, this Court withheld its decision as to the validity of Article 3, Regulations 79 (1936 ed.) as applied prospectively. If that Article is a valid interpretation of the gift tax law, the donor made no taxable gift by the surrender of his reserved power, a complete gift having occurred at the time the trust was created. The generality of Section 501(a), imposing a tax "upon the transfer * * * of property by gift", without defining the taxable event as either (a) the giving up by the donor of all beneficial interest or (b) the unconditional vesting of beneficial interest in the donee, required administrative interpretation. Either event could reasonably have been within the intent of the law. By the 1936 regulation the Commissioner interpreted the Act as imposing tax on the donor's giving up of all beneficial interest.

That regulation was adopted in February, 1936. Thereafter Congress enacted the Revenue Acts of 1936, 1937, 1938

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1 All statutory references in this brief are to the Revenue Act of 1932 unless otherwise indicated.

and 1939, but in none of those acts did Congress attempt to change the interpretation embodied in the 1936 regulation. To that extent Congress inferentially approved such interpretation.

On February 25, 1944, Congress passed, over Presidential veto, the Revenue Act of 1943, containing Section 502 by which the surrender of a grantor's reserved power to change beneficiaries without making himself a beneficiary is not deemed a taxable event if effected in the years 1939 to 1944, inclusive. This was a relief measure, to relieve grantors from the hardship of the decision of this Court in *Sanford's Estate v. Commissioner*, 308 U. S. 37 and *Rasquin v. Humphreys*, 308 U. S. 54. Inferentially Congress again approved the interpretation embodied in the 1936 regulation.

There is no equitable basis for restricting relief to surrenders made in the years 1939-1944. Congress must have assumed that the 1936 regulation was being applied to all transactions occurring after its adoption in February, 1936, through the years 1937 and 1938, and that relief was not needed as to such prior years.

Here the donor surrendered his reserved power in July, 1936, acting in express reliance on the 1936 regulation. Relief having now been given to other donors even less equitably entitled to relief, it is most unfair and unjust that tax should be imposed on the instant transaction. Every consideration underlying the just administration of the tax laws requires that the regulation in effect when the donor surrendered his reserved power be applied to determine his gift tax liability.

The Commissioner is authorized by Section 3791(b) of the Internal Revenue Code to give relief in this situation

and he has recently given relief in a case exactly parallel. To avoid the hardship resulting from this Court's decision in *Helvering v. R. Douglas Stuart,* 317 U. S. 154, the Commissioner issued I. T. 3609, leaving in effect the prior regulation which this Court's decision had nullified and giving only prospective effect to that decision. In the same manner, non-discriminatory administration of the gift tax law requires that the Commissioner determine the donor's liability in this case by applying the regulation in effect when the donor surrendered his reserved power.

2.

Contingent Beneficiaries in Expectancy Do Not Incur Personal Liability as Donees Under Section 510.

Petitioner's liability as trustee of a transferee arises only if the beneficiaries of the instant trust are deemed to be donees on whom personal liability for gift tax is imposed by Section 510.

Section 510 imposes gift tax liability on a donee "to the extent of the value of such gift". The statutory words make clear the underlying principle of that liability, viz., that a donee is personally liable only to the extent that he has received something out of which he may pay the tax. Here the trust beneficiaries are contingent beneficiaries in expectancy of a spendthrift trust. They will receive something of value only if they are living when the donor dies. Until then they will receive nothing from the trust and can realize on nothing in the trust from which to pay any gift tax liability.

To place personal liability on such beneficiaries who have received nothing and may never receive anything conflicts squarely with the due process clause of the Fifth

Amendment. Any such imposition would be fraught with the same basic evil of taxing one person on the property or income of another which was condemned by this Court in *Hoeper v. Tax Commission of Wisconsin*, 284 U. S. 206. Such unconstitutionality was pointed out by Mellott, J., in his dissenting opinion in the case of *Evelyn N. Moore*, 1 T. C. 14, 19.

No provision under any of the federal tax laws places liability for the tax of another person on anyone who has not in fact received property of the other person from which to pay the liability of such other person. A departure from that basic equitable and constitutional principle should not be found in the gift tax law except upon a most positive and compelling statutory provision, which the gift tax law does not contain. By the words "to the extent of the value of such gift," Section 510 conditions the donee's liability on the receipt by the donee of property or value from which the gift tax liability may be paid.

To uphold liability on petitioner is necessarily a decision that the donor's gift tax liability could have been collected by respondent from the contingent beneficiaries in expectancy of the instant spendthrift trust. That decision raises a serious constitutional question. It is significant that the Commissioner has not in this case, or in any other case to our knowledge, attempted to enforce personal liability against such beneficiaries. We submit that such beneficiaries cannot constitutionally be burdened with such liability and by the plain language of the gift tax law are not so burdened. There is therefore no statutory basis for imposing liability on petitioner as a fiduciary of a transferee, because there is no liability of the trust beneficiaries to be imposed against petitioner as their trustee.

3.

No Deficiency Notice Having Been Given to the Donor, Assessment Against Petitioner is Prohibited by Section 513(a).

Section 513(a) authorizes the Commissioner to send a notice of gift tax deficiency to the donor and in absolute language prohibits assessment and collection of the tax until such notice has been sent. That section further enumerates the specific exceptions to the requirement of notice to the donor and to the prohibition against assessment and collection until such notice has been given. Significantly absent from the enumerated exceptions is the liability of donee-transferees and fiduciaries of transferors and transferees.

Collection of the gift tax is made by summary procedure, as is collection of the income and estate tax. Except for the subsequent administrative and judicial review afforded the taxpayer, that procedure would be lacking in due process of law under the Fifth Amendment. See *Phillips v. Commissioner,* 283 U. S. 398. Even in the summary procedure, due process requires that the taxpayer be given notice and opportunity to be heard. Section 513(a) merely complies wtih that due process requirement.

Notice to the donor is essential because it is his tax which is being determined. His gift tax liability is placed on a cumulative basis, the liability of each year being dependent upon the amount of gifts made in prior years. Therefore, in the determination of his gift tax liability for any year, even though it be for a prior year against which assessment is barred, he is entiled to notice and an opportunity to be heard. Section 513(a) properly guarantees

that constitutional protection to the donor which has been violated in this case.

Section 513(a) expresses the obvious legislative intent to require the Commissioner first to assert liability against the donor before pursuing donees or transferees, and thereby to make regular and orderly the collection of the gift tax. Here the Commissioner has taken no step to collect from a solvent donor.

Without the requirement of notice to the donor contained in Section 513(a) the Commissioner would not be required by the law to give preliminary notice to anyone before proceeding with assessment and collection. There is no other notice requirement placed on the Commissioner in the entire gift tax law. Notice to the donor is therefore a prime requisite to the assessment and collection of the gift tax, except in those instances specifically enumerated in Section 513(a), in which adequate reason exists for excusing the notice requirement. Here there is no reason for excusing from the notice requirement, the donor being able at all times to respond to any tax liability found against him, and the statute makes no exception in this kind of case. The soundly grounded prohibition of Section 513(a) against assessment and collection without prior notice to the donor, therefore, precludes collection from petitioner.

4.

The Donee Liability Here Imposed Against Petitioner as Trustee of a Transferee is Barred by the Three-Year Limitation Period Under Section 517(a).

Throughout the gift tax law is the significant use of the expression "the tax imposed by this title." Section 501

provides that "a tax * * * shall be imposed on the transfer * * * of property by gift." That is the "tax imposed by this title." By Section 509 the "tax imposed by this title" is made payable by the donor. By Section 510 the donee is made personally liable for the "tax imposed by this title." Section 517(a) then states that the "taxes imposed by this title" shall be assessed within three years after the donor's return was filed.

The liability of a donee for the "tax imposed by this title" falls squarely within the language of Section 517(a) and must be assessed within the three-year period. It is the donee's alleged liability (which in point 3 of this brief we have shown does not here exist) for the "tax imposed by this title" which the Court below upheld against petitioner by resort to the transferee provisions of Section 526. As is pointed out in point 5 of this brief, the same discriminate use of the statutory words "the tax imposed by this title" appears in Section 526 and conclusively demonstrates the fallacy of resort to that section for upholding the assertion of liability against petitioner.

Section 517(a) imposes an absolute bar against the untimely assessment of the alleged donee's liability. This was aply pointed out by Mellott, J., in his dissenting opinion in the *Evelyn N. Moore* case, 1 T. C. 14, 18, in which he said:

> "If the action were to hold her upon an alleged liability as a donee under section 510, set out in the opinion of the majority, the statute of limitations could be successfully interposed as a defense; for the liability of a donee is 'imposed by Title III,' the same as the liability of a donor."

5.

Statutory Liability of a Donee for "Tax Imposed by This Title" is Not Assessable Under Section 526.

Section 526 relates to the enforcement of the liability of transferees. Section 526(a) provides in substance that "the following liabilities," viz., "the liability, at law or in equity, of a transferee" or "the liability of a fiduciary under section 3467 of the Revised Statutes," may be assessed and collected in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the "tax imposed by this title." By its express language, therefore, Section 526(a) contrasts the "liability, at law or in equity, of a transferee" with statutory liability for the "tax imposed by this title." It clearly differentiates between the two kinds of liability and plainly shows the legislative intent not to include the statutory liability of a donee for the "tax imposed by this title" within the category of "liability, at law or in equity, of a transferee" enforceable under the transferee provisions of Section 526.

This careful differentiation in the statutory language is not merely accidental or purely technical. It accords with logic and good sense and with the prior practice and adjudications under the related transferee provisions of the income and estate tax laws. The gift tax provisions of Section 526 were taken from the estate tax transferee provisions of Section 316 of the Revenue Act of 1926 and the income tax transferee provisions of Section 280 of the Revenue Act of 1926. The transferee provisions of the estate and income tax law were new to the 1926 Act. In the Senate Finance Committee report on the Revenue Act of 1926 it was stated that the provisions relating to trans-

ferred assets were not intended "to define or change existing liabilities," but that if the liability of a transferee exists "under other law," then that liability is to be enforced according to the summary procedure. (See *Wire Wheel Corp.*, 16 B. T. A. 737, 742.)

Every decision under the income and estate tax laws has held that "liability, at law or in equity, of a transferee" for income or estate taxes is limited to that liability which any transferee of property incurs where the transferee by contract assumed the liabilities of the transferor, or where the transferor was insolvent at the time of the transfer or was rendered insolvent by the transfer, or where the transfer was fraudulently made to hinder, delay or defraud the grantor's creditors. No such basis for transferee liability exists in this case.

In carefully differentiating between the "liability, at law or in equity, of a transferee," and statutory liability for the "tax imposed by this title," Section 526(a) adopts the usual and accepted concept of transferee liability as worked out under the income and estate tax laws, to which reference is above made, as the kind of "liability, at law or in equity, of a transferee" which may be enforced under Section 526 of the gift tax law.

To apply Section 526 to the statutory liability of a donee under Section 510, requires that the statutory language distinguishing between statutory liability for the tax and transferee liability at law or in equity be ignored and that the usual and accepted concept of transferee liability at law or in equity be enlarged to include statutory liability.

The purpose thereby to be accomplished is to achieve the additional year for assessing statutory donee liability.

No persuasive reason can be given for ignoring the statutory language and enlarging the accepted concept of liability at law or in equity to accomplish that result. Section 517(a) in words requires the "taxes imposed by this title" to be assessed within three years, and Congress plainly meant that the Commissioner should assess the statutory liability for such taxes within the three-year period, and not to provide a four-year period for assessing such statutory liability. The filing of the donor's return initiates the liabilities of both donor and donee, the liability of the donor becoming due on the due date of the return and the liability of the donee arising immediately thereafter if the tax is not paid by the donor. No reason can be assigned for providing different periods of limitation for the assessment of such co-existing and simultaneous liabilities. If Congress had intended to give the Commissioner four years for proceeding against the donee it could easily have done so. In the language of Mellott, J., in his dissenting opinion in the *Evelyn N. Moore* case, 1 T. C. 14, 19, "It would not have adopted the circuitous method of creating a personal obligation for the tax, providing for a three-year period in which it is to be assessed, and then, merely by 'including' a donee within the definition of a transferee, expect that the transferee section should be construed as if it provided for the assessment of a liability against the recipient of the property even though he had not assumed the tax and thereby become liable at law and even though no circumstances are shown which would make him liable in equity."

Further, the provision of Section 526(f) defining "transferee" as including "donee" is to be construed, in any event, to refer to the kind of donee who may legally be made liable for the donor's tax, viz., a donee who has received something from which he may pay the tax. Here

the contingent beneficiaries in expectancy of a spendthrift trust are not that kind of donee and are not within the purview of Section 526(f) any more than they are subject to the statutory donee liability imposed by Section 510. Such contingent beneficiaries are no more transferees than is any heir, legatee or devisee who is entitled to receive but has not yet received his share from the estate of his deceased benefactor.

6.

Section 527(b) is Not Applicable Because the Required Notice to Make Section 527(b) Operative Was Not Given.

Under Section 527(b) the obligation of a fiduciary of a transferee to assume all of the powers, rights, duties and privileges of such transferee arises only "upon notice to the Commissioner" given in accordance with the regulations prescribed by the Commissioner in Article 61, Regulations 79 (1936 ed.).

Article 61 requires that the notice shall (1) be in writing, signed by the fiduciary, (2) be filed with the Commissioner, (3) state the name and address of the person for whom the fiduciary is acting, (4) state the nature of the liability involved, whether for the tax, and, if so, the years involved, or a liability at law or in equity of a transferee, or the liability of a fiduciary for the donor, and (5) be accompanied with satisfactory evidence of the authority of the fiduciary to act for the transferee or donor.

Petitioner gave no such notice to the Commissioner. The Tax Court held that equivalent notice was given to the Commissioner by the donor's "Gift Tax Return" and by the "Donee's or Trustee's Information Return of Gifts"

which were filed with the Collector of Internal Revenue at Indianapolis, and the Court below deemed the donee's "Information Return" to be sufficient notice to make Section 527 operative. Clearly the donor's Return was not the notice prescribed under Section 527. The donee's "Information Return," Treasury Department Form 710, is prescribed by Article 21 of Regulations 79 (1936 ed.).

The donee's "Information Return" is a "return," not a "notice." Its form and content are entirely different from the prescribed form and content of a "notice" under Section 527. Such Return may be filed by either the donee or trustee, and if filed by the donee need not be filed by the trustee. The Return may be filed either with the Collector or with the Commissioner. The information called for by the Return has little or no relevance to the matter of transferee liability or the liability of a fiduciary for a transferee. Most significant, the donee's "Information Return" is stated by Article 21 to be "for information purposes only."

The Court below has held that such donee's Return, filed "for information purposes only," as required by unrelated Article 21, is effective to burden petitioner with all of the powers, rights, duties and privileges of a transferee under Section 527 and Article 61. This ignores the obvious intent and meaning of the statute, that the assumption of the duties of a transferee shall be voluntary on the part of the fiduciary. The condition "upon notice to the Commissioner" to be given in accord with the Commissioner's regulations, the use of the word "assume," and the exacting requirements made by Article 61 as to the contents of the notice, plainly contemplate voluntary action by the fiduciary. The giving of the required notice is a crucial

event which initiates burdensome obligations and is therefore far different from the donee's Return filed "for information purposes only."

The incongruity and unfairness of holding that such Return is equivalent to the specified notice of fiduciary relationship is particularly emphasized in this case because of the existence of the 1936 regulation, Article 3, which stated that the donor's surrender of his reserved power is not a taxable gift. The decision of the Court below holds that by the filing of the donee's Information Return "for information purposes only" peitioner assumed all of the onerous duties of a transferee in respect to a transaction which the Commissioner's regulations stated was not a taxable event.

The decision below contravenes the decision of this Court in *Commissioner v. Lane-Wells Co.*, 64 S. Ct. 511, decided February 14, 1944. That case involved income tax liability under the Revenue Acts of 1934 and 1936 of a corporation with respect to the additional tax imposed upon personal holding companies by Title IA of the Revenue Acts. The corporation believed in good faith that it was not a personal holding company and filed only a corporate form of tax return, Form 1120, as required by statute and regulation for determining the regular corporate income tax imposed by Title I of the Revenue Acts, and did not file a separate return on Form 1120H in respect to liability for the additional tax imposed by Title IA of the Revenue Acts on personal holding companies. Form 1120H was not required by the Act but was prescribed by Treasury Department regulations issued pursuant to statutory authorization. The taxpayer contended that the regular corporation tax returns filed by it on Form 1120 were sufficient for

the determination of both the regular income tax provided by Title I and the additional personal holding company tax provided by Title IA and that inasmuch as the statutory period for assessment had expired since the filing of Form 1120, the Commissioner was precluded from assessing the personal holding company tax under Title IA. This Court held that Title IA imposed a tax separate from the regular tax imposed by Title I, that the Treasury Department regulation requiring two separate returns for the respective taxes was reasonable and valid and therefore that since no personal holding company tax return was filed the statute of limitations did not commence to run as against that tax.

In the instant case we have a comparable situation. Article 21 of the regulations under the gift tax law requires the filing "for information purposes only" of a "Donee's or Trustee's Information Return of Gifts." Such information return was not required by statute, but was prescribed by the Commissioner under the statutory authorization to prescribe needed rules and regulations. The notice provided for by Section 527(b) and (c) of the Act, and by Article 61 of the regulations thereto, is entirely separate and apart from the information return required by Article 21 of the regulations. Section 527(b) provides that the liability of a fiduciary for a transferee shall arise only "upon notice to the Commissioner," and Section 527(c) provides that such notice shall be given in accord with regulations prescribed by the Commissioner. Article 61 contains the prescribed regulation as to the form, content and filing of the notice of fiduciary relationship. Such notice is not "for information purposes only," but is a notice upon which substantial duties and liabilities arise.

We submit that the filing of the required "Information Return" pursuant to Article 21 for information purposes only, done without any intent to assume any of the powers, rights, duties and privileges of a transferee, and at a time when the regulation provided that no taxable gift had been made by the donor's relinquishment of his reserved power, is far different from the filing of a voluntary and optional notice of fiduciary relationship under Section 527(b) and (c) and Article 61, filed not merely for information purposes but as an assumption by the Trustee of all of the powers, rights, duties and privileges of the trust beneficiaries in respect to gift tax. The information return under Article 21 is as different from the notice of fiduciary relationship under Section 527(b) and (c) and Article 61 as is the regular corporate tax return, Form 1120, different from the personal holding company tax Form 1120H. Uniform application of the principle upon which this Court decided the *Lane-Wells* case therefore requires a holding here that the required notice to make operative Section 527(b) was not given and hence that petitioner is not liable as a fiduciary of a transferee.

The decision below conflicts in principle with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Sanborn v. Helvering*, 108 F. 2d 311, and the decision of the Circuit Court of Appeals for the Ninth Circuit in *Tooley v. Commissioner*, 121 F. 2d 350. Both of those cases properly held that the requisite notice of termination of a fiduciary relationship under the similar fiduciary provisions of the income tax law is not satisfied by information contained in a petition to the Tax Court to the effect that a fiduciary relationship has terminated, and that to stop the continued obligation of a fiduciary the "specified notice" must be given by the fiduciary and can not be waived

by the Commissioner. The same notice requirements are made for initiating as for terminating the fiduciary's assumption of a transferee's duties. The decision below permits any kind of notice or information to the Commissioner to initiate the fiduciary's obligation while the two last cited cases permit the termination of that obligation only upon giving the specified notice. The statute is clear, the prescribed notice must be given in each instance. The decision of the court below is in conflict with the *Sanborn* and *Tooley* decisions and is in error.

7.

Petitioner is Not the Kind of Fiduciary to Which Section 527(b) Applies.

By Section 526(a) the liability at law or in equity of a transferee is made subject to the summary collection procedure. Thereby a transferee acquires all of the statutory rights and duties placed on the donor and donee under that procedure. In addition, a transferee has many rights and duties under other statutory law, under the common law or under equitable principles if liability in an action at law or by a suit in equity is asserted against him.

Only one type of fiduciary is so legally empowered and equipped as to be legally and practicably able to assume such powers, rights, duties and privileges of a transferee, namely, a fiduciary having plenary powers to act for and bind the transferee and possessing the transferee's property. The administrator or executor of a decedent's estate, the guardian or committee of a minor or an incompetent, a receiver of an insolvent or a trustee in bankruptcy, a trustee of property in a trust created by a transferee, and similar fiduciaries who are legally empowered to represent

and act for the transferee and who have his estate in their hands, are the only kind of fiduciaries who are fitted to assume all of the powers, rights, duties and privileges of a transferee.

Other fiduciaries, with narrowly limited powers, such as petitioner, cannot be brought within the purview of Section 527(b) without creating legal conflicts and reaching absurd and unintended results. The instant case is an excellent illustration of the utterly impossible situation which would result if Section 527(b) is applied to petitioner.

Here the trust consists only of insurance policies on the donor's life and petitioner as trustee is acting under a trust agreement which expressly states that the trustee is "to hold said policies without any obligation of any nature in respect thereto other than the safekeeping thereof until they shall mature". Petitioner is for the time being only a custodian of the policies. Its powers and rights as trustee are only coextensive with its duties. Petitioner is therefore not legally empowered or competent under the trust agreement to assume all of the powers, rights, duties and privileges of the trust beneficiaries in respect to their liability for the donor's gift tax. There is nothing in the trust from which petitioner can receive compensation for its services as custodian, much less be paid for undertaking performance of the rights and duties of the beneficiaries in respect to gift tax or from which to pay the considerable expense of exercising and discharging such rights and duties. There is no basis or measure of petitioner's accountability to the beneficiaries for undertaking to exercise and discharge their rights and duties in respect to liability for gift tax. The beneficiaries are entitled to exercise their rights and to discharge their duties in such man-

ner as they shall determine. They are entitled to pay an asserted tax liability or to resist it, as they choose. They have rights and duties almost without end which they are entitled to act on in their own way and which the trustee would be called to act on as the trustee might determine. For example, in resisting a tax determined by respondent, the tax may be paid and action for recovery may be brought in a federal district court, or appeal from the determination, without payment, may be taken to the Tax Court. The trustee and the beneficiaries could disagree as to which procedure to take, or be at odds as to the manner of exercising or discharging the many other rights and duties of the beneficiaries.

Petitioner, as trustee-custodian of the donor's insurance policies, does not have in its hands the "estate" of any transferee and is without power to realize on the policies to meet any gift tax liability that may be owing by the beneficiaries as donee-transferees. If petitioner should be liable and could surrender the policies for their cash value, whose estate could it charge for the disbursement? How could it account to Indiana University which is an exempt donee and is entitled to have its one-third of the full insurance proceeds held perpetually for its benefit undiminished by any gift tax? These complications cannot be ignored. They exemplify the necessity for applying Section 527(b) only to a fiduciary invested with plenary powers to act for and bind the transferee and endowed with the transferee's property or estate from which to pay the transferee's tax liabilities.

If Congress had intended to place on this limited kind of fiduciary the mandatory obligation of assuming all of the powers, rights, duties and privileges of a transferee

it would at least have provided that all of the persons interested in the asserted tax liability and entitled to participate in acceding to or resisting the same should be made parties to the collection proceeding.

Therefore, the fair and reasonable construction to be placed on Section 527(b) is that it applies only to fiduciaries having the plenary power to represent the transferees. Such construction is supported by the reference to the "estate" of the transferee as the source from which the tax is to be paid. The word "estate" is significant in that it is in perfect correlation with the category of fiduciaries having plenary power to act for and bind the persons or estate they represent. The title to the Section, "Fiduciary of Transferee", confirms that construction. "Fiduciary of Transferee" means transferee's fiduciary, that is, a fiduciary succeeding to or appointed by a transferee and receiving property of or from a transferee. Lastly, Article 61 itself confirms that construction by its requirement that with the notice of fiduciary relationship the fiduciary must file satisfactory evidence of the authority of the fiduciary to act for the transferee.

CONCLUSION.

The case at bar presents new questions, serious questions as to the practical operation of the federal gift tax law which is of recent enactment and has not been the subject of any extensive review by the courts. Because of the great number of gifts made through the trust medium the questions are of widespread importance, both to the many fiduciaries involved and to the government in the collection of revenue. Since November, 1942, the Tax Court

has handed down decisions in no less than thirteen cases on the questions here presented or related questions.[2]

The importance of the questions is multiplied many fold by the fact that the transferee provisions of the gift tax law were taken verbatim from the income and estate tax laws. Any decision on the instant questions under the gift tax law is in effect a determination of the meaning and effect of the similar provisions contained in the income and estate tax laws.

On such questions of general interest and importance the Court below has fallen into grevious error. Review by this Court is not only fully warranted but direly needed.

Respectfully submitted,

FLETCHER TRUST COMPANY, Trustees and Transferees,

By JOSEPH J. DANIELS,

PAUL N. ROWE,

Its Attorneys.

BAKER & DANIELS,

Of Counsel.

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[2] E. N. Moore, 1 T. C. 14; Fletcher Trust Co., 1 T. C. 798; A. M. Myer, 2 T. C. —; M. E. Baur, 2 T. C. —; M. A. C. Riter, 3 T. C. —; and unreported memorandum opinions in the cases of S. R. Baer, C. A. E. Goodhart, R. Perkins, R. W. Smyth Trust, W. Watkins, Fidelity Trust Co., Margaret J. Smith Trusts and Nashville Trust Co.

APPENDIX.

STATUTES AND REGULATIONS INVOLVED.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Sec. 501. Imposition of tax.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

* * * * *

Sec. 509. Payment of tax.

(a) *Time of Payment.*—The tax imposed by this title shall be paid by the donor on or before the 15th day of March following the close of the calendar year.

* * * * *

Sec. 510. Lien for tax.

The tax imposed by this title shall be a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. * * *

SEC. 513. [as amended by Sec. 501, Revenue Act of 1934, c. 277, 48 Stat. 680] ASSESSMENT AND COLLECTION OF DEFICIENCIES.

(a) *Petition to Board of Tax Appeals.*—If the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the donor by registered mail. Within 90 days after such notice is mailed (not counting Sunday or legal holiday in the District of Columbia as the ninetieth day), the donor may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the donor, nor until the expiration of such 90-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

For exceptions to the restrictions imposed by this subsection see—

(1) Subsection (d) of this section, relating to waivers by the donor;

(2) Subsection (f) of this section, relating to notifications of mathematical errors appearing upon the face of the return;

(3) Section 514, relating to jeopardy assessments;

(4) Section 516, relating to bankruptcy and receiverships; and

(5) Section 1001 of the Revenue Act of 1926, as amended, relating to assessment or collection of the amount of the deficiency determined by the Board pending court review.

* * * * *

SEC. 517. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

(a) *General Rule.*—Except as provided in subsection (b), the amount of taxes imposed by this title shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of three years after the return was filed.

* * * * *

SEC. 526. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a donor, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this title.

(2) *Fiduciaries.*—The liability of a fiduciary under section 3467 of the Revised Statutes [U. S. C.,

title 31, sec. 192] in respect of the payment of any such tax from the estate of the donor.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) *Period of Limitation.*—The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the donor.

* * * * *

(d) *Suspension of Running of Statute of Limitations.*—The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under section 513 (a) to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

* * * * *

(f) *Definition of "Transferee".*—As used in this section, the term "transferee" includes donee, heir, legatee, devisee and distributee.

(g) *Address for Notice of Liability.*—In the absence of notice to the Commissioner under section 527 (b) of the existence of a fiduciary relationship, notice of liability enforceable under this section in respect of a tax imposed by this title, if mailed to the person subject to the liability at his last known address, shall be sufficient for the purposes of this title even if such person is deceased, or is under a

legal disability, or, in the case of a corporation, has terminated its existence.

SEC. 527. NOTICE OF FIDUCIARY RELATIONSHIP.

(a) *Fiduciary of Donor.*—Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the donor in respect of a tax imposed by this title (except as otherwise specifically provided and except that the tax shall be collected from the estate of the donor), until notice is given that the fiduciary capacity has terminated.

(b) *Fiduciary of Transferee.*—Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 526, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) *Manner of Notice.*—Notice under subsection (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

SEC. 1111. DEFINITIONS.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

(6) The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conserva-

tor, or any person acting in any fiduciary capacity for any person.

* * * * *

(b) The terms "includes" and "including" when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined.

Revenue Act of 1943:

Sec. 502. Certain Discretionary Trusts in Connection with Gift Tax.

(a) Amendment of the Internal Revenue Code. —Section 1000 of the Internal Revenue Code (imposing the gift tax) is amended by inserting at the end thereof the following:

"(e) Certain Discretionary Trusts.—In the case of property in a trust created prior to January 1, 1939, if on and after January 1, 1939, no power to revest title to such property in the grantor could be exercised either by the grantor alone, or by the grantor in conjunction with any other person not having a substantial adverse interest in the disposition of such property or the income therefrom, then a relinquishment by the grantor on or after January 1, 1940, and prior to January 1, 1945, of power or control with respect to the distribution of such property or the income therefrom by an exercise of other termination of such power or control shall not be deemed a transfer of property for the purposes of this chapter. If such property was transferred in trust, the grantor not retaining such power to revest title thereto in himself, or if such power to revest title to such property in the grantor was relinquished, while a law was in effect imposing a tax upon the transfer of property by gift, this subsection shall apply only if (1) gift tax was paid

with respect to such transfer or relinquishment, and not credited or refunded, or a gift tax return was made within the time prescribed on account of such transfer or relinquishment but no gift tax was paid with respect to such transfer or relinquishment because of the deductions and exclusions claimed on such return, and (2) the grantor consents, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, for all purposes of this chapter to treat such transfer or relinquishment in the calendar year in which effected, and for all periods thereafter, as having been a transfer of property subject to tax under this chapter. This subsection shall not apply to any payment or other disposition of income occurring prior to the termination of power or control with respect to the future disposition of income from the trust property."

(b) Amendment of Revenue Act of 1932.—Section 501 of the Revenue Act of 1932 (imposing a gift tax) is amended by inserting at the end thereof the following:

"(c) Certain Discretionary Trusts.—In the case of property in a trust created prior to January 1, 1939, if on and after January 1, 1939, no power to revest title to such property in the grantor could be exercised either by the grantor alone, or by the grantor in conjunction with any other person not having a substantial adverse interest in the disposition of such property or the income therefrom, then a relinquishment by the grantor on or after January 1, 1939, and prior to January 1, 1940, of power or control with respect to the distribution of such property or the income therefrom by an exercise or other termination of such power or control shall not be deemed a transfer of property for the purposes of this title. If such property was transferred

in trust, the grantor not retaining such power to revest title thereto in himself, or if such power to revest title to such property in the grantor was relinquished, while a law was in effect imposing a tax upon the transfer of property by gift, this subsection shall apply only if (1) gift tax was paid with respect to such transfer or relinquishment, and not credited or refunded, or a gift tax return was made within the time prescribed on account of such transfer or relinquishment but no gift tax was paid with respect to such transfer or relinquishment because of the deductions and exclusions claimed on such return, and (2) the grantor consents, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, for all purposes of this title to treat such transfer or relinquishment in the calendar year in which effected, and for all periods thereafter, as having been a transfer of property subject to tax under this title. This subsection shall not apply to any payment or other disposition of income occurring prior to the termination of power or control with respect to the future disposition of income from the trust property."

(c) Interest on Overpayments.—No interest shall be allowed or paid on any overpayment resulting from the application of this section.

Section 3791(b), Internal Revenue Code:

Retroactivity of Regulations or Rulings.—The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect.

Treasury Regulations 79 (1936 ed.):

ART. 3. *Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself, the gift is complete. But a transfer (in trust or otherwise), though passing both legal and beneficial title, is still in essence merely formal so long as there remains in the donor a power to cause the revesting of the beneficial title in himself, and the gift, from the standpoint of substance, remains incomplete during the existence of the power. A donor shall be considered as having the power to revest in himself the beneficial title to the property transferred if he has such power in conjunction with any person not having a substantial adverse interest in the disposition of the property or the income therefrom. A trustee, as such, is not a person having a substantial adverse interest in the disposition of the trust property or the income therefrom. The relinquishment or termination of the power, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply. The receipt of income

or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the formal transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the donor's power to receive it himself, and constitutes a gift of such income or of such other enjoyment taxable in the calendar year of its receipt.

If the donor contends that a power retained by him constitutes beneficial dominion and control, and that by reason thereof the transfer is not in substance a gift, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument by which the transfer was made, should be submitted.

Art. 21. *Donees and trustees required to file notice of gifts.*—All donees and trustees (except such organizations, etc., referred to in section 505 and article 13) receiving property transferred by gift in any one calendar year, shall file a notice on Form 710, unless the value of the gift, or the aggregate value of all the gifts, to the donee or to any one of the beneficiaries of the trust is $5,000, or less, and the subject of the gift is not a future interest in property. Copies of this form may be obtained from any United States collector of internal revenue upon application. When a gift is made in trust notice thereof should be filed by either the beneficiary of the trust or the trustee, but in such case one notice only is required. If property is transferred in trust and the donor retains a power over the property, the notice (which is for information purposes only) should be filed even though it is considered that such power constitutes a retention of beneficial dominion and control and that by reason thereof the transfer is not a gift within the

meaning of the statute. The notice shall be filed in duplicate with the collector for the district in which the donor resides, or with the Commissioner of Internal Revenue at Washington, D. C., on or before the 15th day of March following the close of the calendar year in which the transfer was made. The notice shall disclose the following information: (1) Name and address of donor, (2) date of transfer, (3) a general description of the property transferred, and (4) the approximate value thereof at the date of the transfer.

ART. 61. *Notice of fiduciary relationship.*—As soon as the Commissioner receives notice that any person is acting in a fiduciary capacity, such fiduciary must, except as otherwise specifically provided, assume the powers, rights, duties, and privileges of the donor in respect of the tax. If the person is acting as a fiduciary for a transferee or other person subject to the liability specified in section 526 (see article 60), such fiduciary is required to assume the powers, rights, duties, and privileges of the transferee or other person under that section. * * * The "notice to the Commissioner" provided for in section 527 shall be a written notice signed by the fiduciary and filed with the Commissioner. This notice must state the name and address of the person for whom the fiduciary is acting and the nature of the liability of such person; that is, whether it is a liability for the tax, and, if so, the year or years involved, or a liability at law or in equity of a transferee of property of the donor, or a liability of a fiduciary under section 3467 of the Revised Statutes, as amended by section 518 of the Revenue Act of 1934, in respect of the payment of any tax from the estate of the donor. Satisfactory evidence of the authority of the fiduciary to act for such person in the fiduciary capacity must be filed with and made a part of the notice.

If the fiduciary capacity exists by order of court, a certified copy of the order may be regarded as such satisfactory evidence. When the fiduciary capacity has terminated, the fiduciary, in order to be relieved of any further duty or liability as such, must file with the Commissioner written notice that the fiduciary capacity has terminated as to him, accompanied by satisfactory evidence of the termination of the fiduciary capacity. The notice of termination should state the name and address of the person, if any, who has been substituted as fiduciary.

If the notice of the fiduciary capacity described in the preceding paragraph is not filed with the Commissioner prior to the sending of notice of a deficiency by registered mail to the last known address of the donor (see section 513 (a), as amended by section 501 of the Revenue Act of 1934), or the last known address of the transferee or other person subject to liability (see section 526), no notice of the deficiency will be sent to the fiduciary. In such a case the sending of the notice to the last known address of the donor, transferee, or other person, as the case may be, will be a sufficient compliance with the requirements of the Act, even though such donor, transferee, or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. Under such circumstances if no petition is filed with the Board of Tax Appeals before the expiration of 90 days from the sending of the notice to the donor, transferee, or other person, the tax, or liability under section 526, will be assessed immediately upon the expiration of such 90-day period, and demand for payment will be made by the collector. The term "fiduciary" is defined by section 1111 (a) (6) to mean guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

INDEX

CITATIONS

592267—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 97

FLETCHER TRUST COMPANY, TRUSTEES AND TRANSFEREES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of The Tax Court of the United States (R. 67–75) are reported in 1 T. C. 798. The opinion of the Circuit Court of Appeals (R. 95–102) is reported in 141 F. 2d 36.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 17, 1944. (R. 103.) Petition for rehearing was denied March 23, 1944. (R. 106.) The petition for a writ of certiorari was filed on May 23, 1944. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the surrender by a donor in 1936 of a power to change the beneficiaries of a trust created in 1932, and the terms under which they might take, constituted a taxable gift in 1936, within the meaning of Section 501 of the Revenue Act of 1932.

2. Whether the trustee under the trust is a fiduciary liable as transferee for the gift tax due on the transfer, within the meaning of Section 527 of the Revenue Act of 1932.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 11–25.

STATEMENT

The facts as stipulated (R. 23–62) and as found by the Tax Court (R. 68–71) may be summarized as follows:

Hugh McK. Landon is an American citizen and a resident of Indianapolis, Indiana. He filed a federal gift tax return for the year 1936 with the Collector of Internal Revenue at Indianapolis, Indiana. The Fletcher Trust Company is an Indiana corporation, with its principal place of business in Indianapolis. It conducts a general banking and trust business. (R. 68.)

On May 23, 1932, Landon, as donor (hereinafter referred to at times as "donor"), and Fletcher Trust Company, as trustee (hereinafter referred to as "trustee"), entered into and executed a written trust agreement whereby Landon irrevocably assigned, transferred, and set over unto the trustee certain policies of insurance theretofore issued on his life. Among other provisions, the trust agreement provided that the donor reserved to himself the right to change any of the beneficiaries named therein or the terms under which any beneficiary might take, except that the donor could not himself become a beneficiary. (R. 68.)

The trust agreement was amended by the donor by amendments dated September 7, 1935, September 18, 1935, and July 18, 1936, all of which amendments were accepted by the trustee. By the third amendment, dated July 18, 1936, the donor irrevocably canceled and surrendered his right to change any of the beneficiaries or any of the terms under which any beneficiary was to receive his share. (R. 68–69.)

In a gift tax return for 1936, filed March 15, 1937, the donor recited the facts concerning the trust instrument of May 23, 1932, and outlined the terms of the amendment of July 18, 1936, described above, but reported no amount as taxable gifts during the year. On June 4 and June 7, 1937, the donor filed with the Collector of In-

ternal Revenue statements from the life insurance companies which had issued the above policies of life insurance showing the interpolated or gift tax values of the policies as of July 18, 1936. The values so shown for the four policies involved totaled $99,709.06. (R. 69.)

On June 4, 1937, the trustee filed with the Collector of Internal Revenue for the District of Indiana a "Donee's or Trustee's Information Return of Gifts" for the year 1936, disclosing information similar to that appearing on the gift tax return previously filed by the donor. No gift tax was paid by either the donor or the trustee in respect of 1936 gifts by the donor. (R. 69.)

On January 18, 1941, the Commissioner mailed to the trustee a notice of determination of deficiency against it as transferee for a gift tax on 1936 gifts made by the donor. The Commissioner at no time mailed a notice of such deficiency to the donor. (R. 70–71.)

The Commissioner ruled that the relinquishment of the power to change the beneficiaries and the terms under which they might take constituted a taxable gift in 1936 and that the trustee was liable as transferee for the gift tax resulting therefrom (R. 58–62). The Tax Court sustained the Commissioner (R. 71, 74), and on appeal by the trustee the court below affirmed the decision of the Tax Court (R. 102).

ARGUMENT

The court below decided correctly the two questions involved in the trustee's application for a writ of certiorari and there is no occasion for further review. The questions are whether the surrender by the donor in 1936 of his power to change the beneficiaries and alter their interests was a taxable gift and whether the gift tax liability can be collected from the trustee.

1. The first question is controlled by the decisions of this Court in *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, and *Rasquin* v. *Humphreys*, 308 U. S. 54, which were followed by the court below (R. 97). The court also applied *Higgins* v. *Commissioner*, 129 F. 2d 237 (C. C. A. 1st), certiorari denied, 317 U. S. 658 (R. 97). These decisions establish that a gift in trust is incomplete if power is reserved in the donor to change the beneficiaries or otherwise alter the disposition of the property, although not to the donor's benefit, and that only upon relinquishment of the power does the transfer become subject to the gift tax. Accordingly, not until 1936, when the donor relinquished his power to change the beneficiaries and to alter their interests did the gift here involved become taxable.

(a) The court below did not err in refusing to apply Article 3 of Treasury Regulations 79, as promulgated in 1936 (Appendix, *infra*, pp. 21–22). Those regulations, until amended in 1940 to con-

form to the decisions in the *Sanford* and *Humphreys* cases (Appendix, *infra,* pp. 18–21), provided that a transfer is complete for purposes of the gift tax unless the donor reserves the power to cause the beneficial title to be revested in himself. However, this Court held in the *Humphreys* case that whatever validity the regulations might have had prospectively, they were so plainly in conflict with the statute as to preclude them from being applied retroactively to the transfer made by the creation in 1934 of the trust there involved (308 U. S. 54, 56). Similarly, they may not be applied to the transfers effected in 1932 by the creation of the trust in the present case. It follows under this Court's decisions in both the *Sanford* and *Humphreys* cases that the transfer became taxable in 1936 and that this result would be required without regard to the 1940 amendments to the regulations.

(b) Section 502 of the Revenue Act of 1943 (Appendix, *infra,* pp. 16–17) has no possible application to the facts in this case. That section is clearly limited in its application to releases of powers effectuated on or after January 1, 1939. The release in this case took place in 1936. Neither is the taxpayer entitled to demand relief under Section 3791 (b) of the Internal Revenue Code (Appendix, *infra,* pp. 17–18), which gives the Commissioner a purely discretionary power to determine the extent, *if any,* to which any ruling, regu-

lation, or Treasury Decision shall be applied without retroactive effect.

2. The second question, as to whether the gift tax deficiency can be collected from the trustee, is controlled by plain and unambiguous statutory provisions.

(a) If the gift tax is not paid by the donor, the statute contains provisions for collecting the tax from other persons. (See *Phillips* v. *Commissioner,* 283 U. S. 589.) The tax is made a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made, and if the tax is not paid when due the donee of any gift is made personally liable for the tax to the extent of the value of the gift (Sec. 510, Revenue Act of 1932,[1] Appendix, *infra,* p. 11). Section 526 (Appendix, *infra,* pp. 13–15) provides that, generally, the procedure for assessing and collecting the tax from other persons shall be the same as that prescribed for the donor in Section 513 (Appendix, *infra,* pp. 12–13). This procedure is specifically made applicable by Section 526 (a) (1) to the liability of a transferee of property of a donor. "Transferee" is defined in Section 526 (f) as including a donee.[2] Section 526 (b) (1) provides that the period of limitation

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[1] Subsequent references are to sections of the Revenue Act of 1932, unless otherwise indicated.

[2] The beneficiaries of a gift in trust are the donees. *Helvering* v. *Hutchings,* 312 U. S. 393; *United States* v. *Pelzer,* 312 U. S. 399.

for assessment of the liability of a transferee shall extend for a year after the expiration of the period of limitation for assessment against the donor.

Section 526 (g), in conjunction with Section 527 (b) (Appendix, *infra,* pp. 14–15) prescribes the means whereby the Commissioner shall be notified that any person is acting in a fiduciary capacity for a transferee, in order that the fiduciary shall assume, on behalf of the transferee, the powers, rights, duties and privileges of the latter, including liability to receive the notice of deficiency which sets the assessment and collection procedure in operation. The notice of fiduciary relationship is to be given to the Commissioner in accordance with regulations prescribed by him (Sec. 527 (c), Appendix, *infra,* p. 15). The regulations prescribed pursuant to the authority so granted (Treasury Regulations 79, Art. 61, Appendix, *infra,* pp. 23–25) do not require that the notice be given on any particular form, although it is to be in writing, signed by the fiduciary, and filed with the Commissioner.[3] Section 1111 (Appendix, *infra,* pp. 15–16) defines the term "fiduciary"

[3] The regulation involved in *Commissioner* v. *Lane-Wells Co.*, 321 U. S. 219, was of a wholly different nature and that case is readily distinguishable. *Tooley* v. *Commissioner*, 121 F. 2d 350 (C. C. A. 9th), and *Sanborn* v. *Helvering*, 108 F. 2d 311 (C. C. A. 8th), also do not apply because in those cases the fiduciaries took no action in conformity with the regulations.

as meaning, among others, a trustee or any person acting in any fiduciary capacity. As the court below held (R. 102), petitioner's information return of June 4, 1937 (*supra,* p. 4) advised the Collector and the Commissioner that it stood in such a relationship to the donee and effectively fulfilled the purpose of the required notice to the Commissioner.

(b) The whole scheme of the statute for effecting the collection of a donor's gift tax liability from a transferee is clearly and unambiguously expressed in the sections of the statute referred to above. The Tax Court of the United States and the Circuit Court of Appeals considered the arguments now advanced by the trustee in its petition for a writ of certiorari and held, in well reasoned opinions, that the statutory transferee proceedings are available to the Commissioner against this trustee. It is not necessary to repeat what the courts below said in reply to the trustee's arguments. Suffice it to say that the interpretations of the statute contended for in the courts below were contrary to the plain meaning of the statutory language. Furthermore, unless the courts below had interpreted the statute in accordance with its clear meaning, it would have meant that, in cases such as the present one, the Commissioner would be wholly prevented from resorting to transferee proceedings to collect the gift tax from the trustee. Such a result would

disrupt the collection procedure and would render the statute ineffective in a large area in which it should clearly apply.

CONCLUSION

The decision of the lower court is correct and does not present a conflict. There is no question involved which warrants consideration by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1944.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States. The tax shall not apply to a transfer made on or before the date of the enactment of this Act.

* * * * *

SEC. 509. PAYMENT OF TAX.

(a) *Time of payment.*—The tax imposed by this title shall be paid by the donor on or before the 15th day of March following the close of the calendar year.

* * * * *

SEC. 510. LIEN FOR TAX.

The tax imposed by this title shall be a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. * * *

* * * * *

SEC. 513. [as amended by Sec. 501, Revenue Act of 1934, c. 277, 48 Stat. 680] ASSESSMENT AND COLLECTION OF DEFICIENCIES.

(a) *Petition to Board of Tax Appeals.*—If the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the donor by registered mail. Within 90 days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the donor may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the donor, nor until the expiration of such 90-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

For exceptions to the restrictions imposed by this subsection see—

(1) Subsection (d) of this section, relating to waivers by the donor;

(2) Subsection (f) of this section, relating to notifications of mathematical errors appearing upon the face of the return;

(3) Section 514, relating to jeopardy assessments;

(4) Section 516, relating to bankruptcy and receiverships; and

(5) Section 1001 of the Revenue Act of 1926, as amended, relating to assessment or collection of the amount of the deficiency determined by the Board pending court review.

* * * * *

SEC. 517. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

(a) *General Rule.*—Except as provided in subsection (b), the amount of taxes imposed by this title shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of three years after the return was filed.

* * * * *

SEC. 526. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a donor, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this title.

(2) *Fiduciaries.*—The liability of a fiduciary under section 3467 of the Revised

Statutes [U. S. C., title 31, sec. 192] in respect of the payment of any such tax from the estate of the donor.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) *Period of Limitation.*—The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the donor.

*   *   *   *   *

(d) *Suspension of Running of Statute of Limitations.*—The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under section 513 (a) to the transferee or fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

*   *   *   *   *

(f) *Definition of "Transferee".*—As used in this section, the term "transferee" includes donee, heir, legatee, devisee, and distributee.

(g) *Address for Notice of Liability.*—In the absence of notice to the Commissioner under section 527 (b) of the existence of a fiduciary relationship, notice of liability enforceable under this section in respect of a tax imposed by this title, if mailed to the person subject to the liability at his

last known address, shall be sufficient for the purposes of this title even if such person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

SEC. 527. NOTICE OF FIDUCIARY RELATIONSHIP.

(a) *Fiduciary of Donor.*—Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the donor in respect of a tax imposed by this title (except as otherwise specifically provided and except that the tax shall be collected from the estate of the donor), until notice is given that the fiduciary capacity has terminated.

(b) *Fiduciary of Transferee.*—Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in section 526, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) *Manner of Notice.*—Notice under subsection (a) or (b) shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * *

SEC. 1111. DEFINITIONS.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

(6) The term "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

* * * * *

(b) The term "includes" and "including" when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined.

Revenue Act of 1943, Public Law 235, 78th Cong., 2d Sess.:

SEC. 502. CERTAIN DISCRETIONARY TRUSTS IN CONNECTION WITH GIFT TAX.

* * * * *

(b) *Amendment of Revenue Act of 1932.*—Section 501 of the Revenue Act of 1932 (imposing a gift tax) is amended by inserting at the end thereof the following:

"(c) *Certain Discretionary Trusts.*—In the case of property in a trust created prior to January 1, 1939, if on and after January 1, 1939, no power to revest title to such property in the grantor could be exercised either by the grantor alone, or by the grantor in conjunction with any other person not having a substantial adverse interest in the disposition of such property or the income therefrom, then a relinquishment by the grantor on or after January 1, 1939, and prior to January 1, 1940, of power or control with respect to the distribution of such property or the income therefrom by an exercise or other termination of such power or control shall not be deemed a transfer of property for the purposes of this title. If such property was transferred in trust, the grantor not retaining such power to revest title thereto

in himself, or if such power to revest title to such property in the grantor was relinquished, while a law was in effect imposing a tax upon the transfer of property by gift, this subsection shall apply only if (1) gift tax was paid with respect to such transfer or relinquishment, and not credited or refunded, or a gift tax return was made within the time prescribed on account of such transfer or relinquishment but no gift tax was paid with respect to such transfer or relinquishment because of the deductions and exclusions claimed on such return, and (2) the grantor consents, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, for all purposes of this title to treat such transfer or relinquishment in the calendar year in which effected, and for all periods thereafter, as having been a transfer of property subject to tax under this title. This subsection shall not apply to any payment or other disposition of income occurring prior to the termination of power or control with respect to the future disposition of income from the trust property."

(c) *Interest on Overpayments.*—No interest shall be allowed or paid on any overpayment resulting from the application of this section.

Internal Revenue Code:

SEC. 3791. RULES AND REGULATIONS.

*　　*　　*　　*　　*

(b) *Retroactivity of Regulations or Rulings.*—The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision,

relating to the internal revenue laws, shall be applied without retroactive effect (26 U. S. C., Sec. 3791).

Treasury Regulations 79 (1936 Ed.):

ART. 3 [as amended by T. D. 5010, 1940-2 Cum. Bull. 293-295]. *Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and their scope determined.

A gift is incomplete in every instance where a donor reserves the power to revest

the beneficial title to the property in himself. A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new beneficiaries or to change the interests of the beneficiaries as between themselves. Thus, the transfer of an estate for life where, by an exercise of the power, the estate may be terminated or cut down to one of less value, and without restriction upon the extent to which the estate may be so cut down, constitutes an incomplete gift. Modifying the example by treating the power as confined to the right to cut down the estate for life to one for a term of five years, the certainty of an estate for not less than that term results in a gift to that extent complete.

A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift.

A donor shall be considered as himself having the power where it is exercisable by him in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom. A trustee, as such, is not a person having an adverse interest in the disposition of the trust property or its income.

The relinquishment or termination of a power to change the disposition of the transferred property, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply. The receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the initial transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the power, and constitutes a gift of such income or of such other enjoyment taxable as of the calendar year of its receipt.

If the donor contends that the power is of such nature as to render the gift incomplete, and hence not subject to the tax as of the calendar year of the initial transfer, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument of transfer, should be submitted.

If for any calendar year prior to the calendar year 1939 a transfer has been subjected to payment of the tax despite the fact that the donor retained a power to name new beneficiaries or to change the interests of the beneficiaries as between themselves, and if the tax for such calendar year has been finally determined on such basis, and for all gift tax purposes such transfer has been treated, for such calendar year and each subsequent calendar year, as subject to the tax, and the donor agrees, in a closing agreement executed under the provisions of section 3760, that he will continue so to treat such transfer,

then the relinquishment or termination of the power so retained by the donor shall not be treated as a gift subject to the tax.

Treasury Regulations 79 (1936 Ed.):

ART. 3. *Cessation of donor's dominion and control.*—The tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself, the gift is complete. But a transfer (in trust or otherwise), though passing both legal and beneficial title, is still in essence merely formal so long as there remains in the donor a power to cause the revesting of the beneficial title in himself, and the gift, from the standpoint of substance, remains incomplete during the existence of the power. A donor shall be considered as having the power to revest in himself the beneficial title to the property transferred if he has such power in conjunction with any person not having a substantial adverse interest in the disposition of the property or the income therefrom. A trustee, as such, is not a person having

a substantial adverse interest in the disposition of the trust property or the income therefrom. The relinquishment or termination of the power, occurring otherwise than by the death of the donor (the statute being confined to transfers by living donors), is regarded as the event which completes the gift and causes the tax to apply. The receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary (other than by the donor himself) during the interim between the making of the formal transfer and the relinquishment or termination of the power operates to free such income or other enjoyment from the donor's power to receive it himself, and constitutes a gift of such income or of such other enjoyment taxable in the calendar year of its receipt.

If the donor contends that a power retained by him constitutes beneficial dominion and control, and that by reason thereof the transfer is not in substance a gift, the transaction shall be disclosed in the return and evidence showing all relevant facts, including a copy of the instrument by which the transfer was made, should be submitted.

* * * * *

ART. 21. *Donees and trustees required to file notice of gifts.*—All donees and trustees (except such organizations, etc., referred to in section 505 and article 13) receiving property transferred by gift in any one calendar year shall file a notice on Form 710, unless the value of the gift, or the aggregate value of all the gifts, to the donee or to any one of the beneficiaries of the trust is $5,000, or less, and the subject of the gift is not a future interest in property. Copies of this

form may be obtained from any United States collector of internal revenue upon application. When a gift is made in trust notice thereof should be filed by either the beneficiary of the trust or the trustee, but in such case one notice only is required. If property is transferred in trust and the donor retains a power over the property, the notice (which is for information purposes only) should be filed even though it is considered that such power constitutes a retention of beneficial dominion and control and that by reason thereof the transfer is not a gift within the meaning of the statute. The notice shall be filed in duplicate with the collector for the district in which the donor resides, or with the Commissioner of Internal Revenue at Washington, D. C., on or before the 15th day of March following the close of the calendar year in which the transfer was made. The notice shall disclose the following information: (1) Name and address of donor, (2) date of transfer, (3) a general description of the property transferred, and (4) the approximate value thereof at the date of the transfer.

* * * * *

ART. 61. *Notice of fiduciary relationship.*—As soon as the Commissioner receives notice that any person is acting in a fiduciary capacity, such fiduciary must, except as otherwise specifically provided, assume the powers, rights, duties, and privileges of the donor in respect of the tax. If the person is acting as a fiduciary for a transferee or other person subject to the liability specified in section 526 (see article 60), such fiduciary is required to assume the powers, rights, duties, and privileges of the transferee or other person under that section. * * * The "notice to the

Commissioner" provided for in section 527 shall be a written notice signed by the fiduciary and filed with the Commissioner. The notice must state the name and address of the person for whom the fiduciary is acting and the nature of the liability of such person; that is, whether it is a liability for the tax, and, if so, the year or years involved, or a liability at law or in equity of a transferee of property of the donor, or a liability of a fiduciary under section 3467 of the Revised Statutes, as amended by section 518 of the Revenue Act of 1934, in respect of the payment of any tax from the estate of the donor. Satisfactory evidence of the authority of the fiduciary to act for such person in the fiduciary capacity must be filed with and made a part of the notice. If the fiduciary capacity exists by order of court, a certified copy of the order may be regarded as such satisfactory evidence. When the fiduciary capacity has terminated, the fiduciary, in order to be relieved of any further duty or liability as such, must file with the Commissioner written notice that the fiduciary capacity has terminated as to him, accompanied by satisfactory evidence of the termination of the fiduciary capacity. The notice of termination should state the name and address of the person, if any, who has been substituted as fiduciary.

If the notice of the fiduciary capacity described in the preceding paragraph is not filed with the Commissioner prior to the sending of notice of a deficiency by registered mail to the last known address of the donor (see section 513 (a), as amended by section 501 of the Revenue Act of 1934), or the last known address of the transferee or other person subject to

liability (see section 526), no notice of the deficiency will be sent to the fiduciary. In such a case the sending of the notice to the last known address of the donor, transferee, or other person, as the case may be, will be a sufficient compliance with the requirements of the Act, even though such donor, transferee, or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. Under such circumstances if no petition is filed with the Board of Tax Appeals before the expiration of 90 days from the sending of the notice to the donor, transferee, or other person, the tax, or liability under section 526, will be assessed immediately upon the expiration of such 90-day period, and demand for payment will be made by the collector. The term "fiduciary" is defined by section 1111 (a) (6) to mean guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

FLETCHER TRUST COMPANY, TRUSTEES AND TRANSFEREES,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 97

PETITIONER'S BRIEF IN REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

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October Term, 1944

Fletcher Trust Company, Trustees and Transferees,
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v.
Commissioner of Internal Revenue,
Respondent.

No. 97

PETITIONER'S BRIEF IN REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

I

Respondent's brief supports the existence of tax liability in this case on purely technical grounds. It makes no argument whatever on the equity of the tax imposition and contains nothing to refute our contentions as to the unfairness and discrimination resulting from enforcing tax liability in this case. We take it therefore as conceded by respondent that the imposition of gift tax here is inequitable and discriminates against petitioner and against the donor

whose gift is involved. To remedy that inequity and discrimination this Court should review the case and reverse the Circuit Court of Appeals and the Tax Court.

II

On the question of the right to collect the donor's gift tax from petitioner as the Trustee of a transferee, respondent's brief refers mainly to the opinions of the Circuit Court of Appeals and the Tax Court as answering petitioner's contentions. In that connection respondent raises two points which call for reply. On page 7 of respondent's brief it is said: "The tax is made a lien upon all gifts made during the calendar year, for ten years from the time the gifts are made * * *," from which statement it may be inferred that the instant case involves the simple matter of the enforcement of a statutory lien. However, the specific statutory provisions in that respect are not to be ignored. Section 517(a)* requires the tax to be assessed within three years after the donor's return was filed and permits no proceeding in court without assessment unless begun within such three-year period.

To enforce the statutory lien created by Section 510 it is first necessary that a valid assessment be made. As shown under point 4, at pages 19-20, of petitioner's brief, there can be no valid assessment of the statutory liability of a donee for gift tax unless such assessment is made within the three-year period provided by Section 517(a). In this case the three-year period had expired before respondent issued a deficiency notice. Furthermore, as shown under point 3, at pages 18-19 of petitioner's brief,

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* The statutory references in this reply brief are to the Revenue Act of 1932 unless otherwise indicated.

Section 513(a) prohibits any assessment, distraint or collection proceeding without the prior giving of a deficiency notice to the donor. Such notice to the donor was not given in this case. Therefore, the statutory requirements prerequisite to the enforcement of a lien have not been and cannot be complied with, and the statutory lien cannot be enforced in this case.

The statutory lien provision has even confused the Circuit Court of Appeals for the Third Circuit in its decision in *Fidelity Trust Co. v. Commissioner*, 141 F. 2d 54, a decision in which that Court refused to follow the reasoning and grounds upon which the case at bar was decided by the Circuit Court of Appeals for the Seventh Circuit and by the Tax Court and advanced as its basis for holding the trustee of a gift in trust liable as trustee for a transferee under Sections 526 and 527, the theory that the statutory lien provision had the effect of creating a liability at law or in equity against the "trust estate", enforceable against the "trust estate" as a transferee under Section 526. But the possible existence of a lien *if* certain statutory steps are taken to perfect such lien does not create a liability at law or in equity against any transferee, and we know of no other case under any of the federal tax laws so holding. Furthermore, there is no basis for treating the "trust estate" as a separate legal entity, as persons, fiduciaries and corporations are treated under the gift tax law. Under the income tax law estates and trusts are by express statutory provisions placed in the category of taxpayer entities, but that is not true under the gift tax.

Therefore, the statutory lien provision has no bearing on the questions presented in this case. That provision

has served only to lead the Circuit Court of Appeals for the Third Circuit into a conflict with the decision in the case at bar of the Circuit Court of Appeals for the Seventh Circuit as to the legal theory on which the trustee of a gift in trust may be held liable for the donor's gift tax.

III

At pages 9-10 of respondent's brief it is stated that if petitioner's contentions should be upheld the Commissioner would be wholly prevented from resorting to transferee proceedings to collect gift tax from a trustee, thereby disrupting the collection procedure and rendering the statute ineffective in a large area to which it should apply. With that statement we take issue. The Commissioner need only give a timely notice of deficiency determination to the donor, as required by Section 513(a), and make a timely assessment within the three-year limitation period prescribed by Section 517(a), and the Commissioner is then freed of all statutory restriction in proceeding against transferees and in enforcing the lien against the property given by the donor.

IV

In addition to the numerous cases cited at page 33 of petitioner's brief, showing the importance of the questions here presented, are the more recent decisions of the Tax Court in *Eileen K. Vogel*, Memo. Dec. No. 13854(M) and *Fidelity-Philadelphia Trust Company*, Dec. No. 13884, 3 T. C. .... The opinion of the Tax Court in the *Fidelity-Philadelphia Trust Company* case emphasizes another aspect of the argument made under point 2 at pages 16-17 of petitioner's brief, viz., that the donee-beneficiaries in expectancy of a spendthrift gift in trust do not incur liability

for gift tax under Section 510. That case brings out the failure of the Commissioner in this case to sustain the burden of proof of the transferee liability upheld against petitioner.

Petitioner's liability under Section 527, if any exists, is derivative, i.e., petitioner's duty as trustee is to assume the liability of the donee-beneficiaries. Under Section 510 the liability of each donee-beneficiary is limited to the value of the gift to him. It is obvious that there can be no fair market value, or realizable value in any amount, in a gift of a contingent interest in expectancy in a spendthrift trust, and respondent introduced no evidence in this case to prove the existence of any such value. Respondent has therefore wholly failed to meet the burden of proof of transferee liability placed on respondent by Section 1119(a) of the Internal Revenue Code.

CONCLUSION

We say again that the questions presented in this case are of such general interest and great importance that review by this court is warranted; that the questions have been erroneously decided by the courts below and correction by this Court is needed; and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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